

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1995

**FILED**

**February 13, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE, )  
)  
Appellee, )  
)  
v. )  
)  
BILLY GENE EARNEST, )  
)  
Appellant. )

No. 01C01-9412-CR-00434

Macon County

Hon. J.O. Bond, Judge

(Second Degree Murder)

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OPINION FILED: \_\_\_\_\_

AFFIRMED AS MODIFIED

Joseph M. Tipton  
Judge

OPINION

The defendant, Billy Gene Earnest, appeals as of right from his judgment of conviction in the Criminal Court of Macon County for second degree murder, a Class A felony. He was sentenced to forty years in the custody of the Department of Correction as a Range III, persistent offender. In this appeal as of right, the defendant presents the following issues:

- (1) whether the evidence is sufficient to support his conviction for second degree murder,
- (2) whether the trial court erred in allowing a witness who had been excused after testifying to return to the stand for the purpose of impeaching another witness, and
- (3) whether the trial court imposed an excessive sentence relative to the defendant's offender status and the applicable enhancement factors.

The facts surrounding this offense involve the beating death of Barry Wayne Griffin whose body was found in a wooded area on March 5, 1992. Mary Griffin, the victim's mother, testified that she last saw her son on February 21, 1992, while visiting at her daughter's house. She stated that he was depressed but had not been drinking. She stated that the victim usually telephoned or visited each day and that she did not hear from him for several days. After several days, she called the police and reported him missing.

Lieutenant Jerry Dallas of the Lafayette Police Department testified that he had nineteen years of law enforcement experience and had been the chief investigator for the police department for the past ten or twelve years. He stated that Ms. Griffin telephoned him on February 25th and reported the victim missing. Based upon his initial investigation, Lieutenant Dallas learned that the victim was last seen at Billy Williams' home at Polston's Trailer Court. He stated that he spoke with the residents of the trailer, Shirley Jones and Billy Williams, as well as Doug Patterson and discussed the whereabouts of the victim. He testified that he was looking for a missing

witness named "Blue" who later turned out to be the defendant. He stated that he searched Billy Williams' trailer but found no evidence related to the victim's disappearance.

Lieutenant Dallas testified that the victim's body was found in a remote wooded area on Dark Hollow Road about two and one-half miles from the trailer park on March 5, 1992. He stated that the body was found at the bottom of a thirty-five foot embankment. The victim's body was otherwise identifiable by a tattoo on the defendant's left arm. After the body was discovered, Lieutenant Dallas interviewed several individuals again. He stated that he interviewed Billy Williams and Doug Patterson about four or five times and that their version of the events leading up to the victim's disappearance changed after the body was found.

Lieutenant Dallas testified that he continued to attempt to locate "Blue." He finally discovered the defendant's real name and went to his last known address in Madison, Tennessee, but the defendant had already left the state. He then attempted to find the defendant in California, Arizona, Arkansas and through the Federal Bureau of Investigation. In October of 1992, the defendant was indicted for the victim's murder pursuant to a sealed indictment. The defendant found out about the indictment, though, and reported to Oklahoma authorities in February 1993.

Lieutenant Dallas testified that he and the Lafayette police chief traveled to Oklahoma City to take custody of the defendant on February 9, 1993. They did not interview the defendant on the return trip to Tennessee. Lieutenant Dallas testified that they stopped at a Wal-Mart upon their return and, while the police chief was in the store, he advised the defendant of his rights and initiated an interview. The defendant told him that he did not want to talk until he had spoken with his lawyer but the defendant stated, "I'll tell you this much . . . after I got out of jail on Sunday morning I

went back down there and tried to find him and I couldn't. I didn't believe he was dead." Lieutenant Dallas testified that the defendant referred to a sentence for driving under the influence that he had served on the two days subsequent to the offense. On cross-examination, Lieutenant Dallas testified that after he learned that the autopsy revealed that the victim had been beaten to death, he returned to Billy Williams' trailer and confiscated a large stick that he believed could have caused the injuries.

Murl Carter testified that he lived on Dark Hollow Road with his mother and sister in early 1992. He stated that he and his sister were collecting cans on March 5th when he discovered the victim's body while walking along the creek. He said that he did not touch or move the body and immediately took his sister home to tell his mother. After his mother went to see the body herself, the family called the police. On cross-examination, Mr. Carter stated that he had lived on Dark Hollow Road about two weeks when he discovered the body and that he did not live there anymore. He described the embankment as very steep without any guardrails. He admitted that someone who was unsteady on their feet could easily fall down the embankment.

Patricia Wix testified that she was dating Billy Meador in February of 1992. She stated that Mr. Meador lived in Polston's Trailer Park and that the two of them would check on Billy Williams, who was disabled, about once a week to make sure he did not need anything. On the night of February 21, 1992, she and Mr. Meador visited Mr. Williams. When they arrived, there were liquor bottles all around. She was introduced to Doug Patterson, the victim and a man named "Blue" whom she later identified as the defendant.

Ms. Wix stated that all of the men were drinking. She said that the victim was staggering around and trying to pick a fight. Mr. Williams told him that it was time for him to leave and the victim charged Mr. Williams and knocked him down. Ms. Wix

testified that Mr. Patterson and the defendant grabbed the victim and took him outside. She testified that when they returned, the defendant began bragging about busting the victim in the mouth or the nose. She said that the defendant had splattered blood across his shirt. She also said that the defendant kept pacing around the trailer and wanted to go outside to stomp the victim. She stated that Mr. Patterson calmed the defendant by telling him that the victim was just drunk and would be all right later.

Ms. Wix testified that she and Mr. Meador visited for only ten or fifteen minutes. She said that no one else came in or left the trailer before they left. She stated that the victim was outside under a tree when she and Mr. Meador left Mr. Williams' trailer. She wanted to check on the victim, but Mr. Meador told her it was none of her business and made her go to the car. She said that she saw no one else that night, only learning later that the victim was missing when Lieutenant Dallas interviewed her.

On cross-examination, Ms. Wix admitted that she had read her statement a few weeks before testifying but stated that she had not read it in the last couple of days. She denied that Mr. Williams drank everyday and reported that she had seen him not drinking more often than drinking. She had no recollection of an argument over a guitar on the night of the victim's disappearance. She could not recall a large stick at the Williams' trailer but noted that Mr. Williams had a cane. She testified that the victim was trying to start a fight with anyone who would fight him. She recalled that he even made some remarks to her, but she could not remember what he said. She said that she did not visit Mr. Williams again because she and Mr. Meador broke up the following week. When confronted with her statement to Lieutenant Dallas, she admitted that she had not told him that the defendant bragged about injuring the victim's nose or mouth and that his shirt was splattered with blood. She explained that she was very nervous when she gave the statement. She stated that she was sure

she was not confusing the defendant with Mr. Patterson because the defendant was very angry that night. She said that she could not tell if the victim was dead under the tree that night. On redirect-examination, Ms. Wix testified that the victim was the drunkest of all those present at Mr. Williams' trailer that night. She added that the defendant was very drunk also.

Billy Meador testified that he lives in Polston's Trailer Park. He stated that he had been acquainted with Mr. Williams for a few months in February 1992. He stated that he and Ms. Wix visited Mr. Williams occasionally and that he would sometimes run errands for Mr. Williams. He stated that he had known Mr. Patterson since he was about fifteen years old but only knew the defendant "slightly." He did not know the victim at all. He admitted that he drank a beer before visiting Mr. Williams on February 21st. He stated that he and Ms. Wix arrived around 7:00 or 8:00 in the evening and that Mr. Williams, Mr. Patterson, the victim and the defendant had all been drinking. He testified that the victim was "pretty well drunk."

Mr. Meador stated that the victim came toward him twice and Mr. Williams told the victim that he would have to leave. He said that Mr. Patterson and the defendant helped him to the door and that the victim fell out the door. He stated that he could see the victim's boots but could not tell whether he had passed out or knocked himself out from falling. He stated that Mr. Patterson returned to the trailer and, a few minutes later, the defendant also returned. He could not recall the defendant saying anything when he returned to the trailer and stated that the defendant appeared calm. He stated that the victim was the drunkest. On cross-examination, he stated that he did not see any blood on the defendant when he returned to the trailer. He also said that he did not hear them fighting although the door was slightly open and he was sitting only four feet away.

Dr. Julia Goodin, Deputy Medical Examiner for Middle Tennessee, testified that she has performed over one thousand five hundred autopsies. She stated that she performed the autopsy on the victim's body in March of 1992. She testified that the victim suffered a contusion to the upper right side of his head, an abrasion to the bridge of his nose and several abrasions on both sides of his torso. There was substantial bruising to the left side of the victim's head as well as some bruising in his abdomen. She also stated that there were three lacerations to the victim's intestines and blood in his abdominal cavity indicating severe internal injuries. He also suffered blows to his kidneys and pancreas as evidenced by internal bleeding. A blood alcohol test revealed a .31 percent blood alcohol level. The doctor concluded that the victim's cause of death was a combination of blunt force injuries to the head and to the abdomen. She testified that the decomposition of the body was consistent with his death occurring about two weeks before the autopsy. She stated that the victim probably did not die immediately and could have lived a few hours. On cross-examination, the doctor added that the victim's urine alcohol level was .38 percent. She also reiterated that she could not determine the exact day or time of the victim's death.

Billy Williams testified that he has lived in Macon County for about three years. He stated that he lived at Polston's Trailer Park from April of 1991 until April of 1992. He said that he and the defendant were casual friends and that he knew the defendant as a resident of the trailer park. He said that the defendant lived there about four or five months before moving away sometime before February 21, 1992. He stated that he had known the victim for about ten months and had known Mr. Patterson for about one year. He stated that Shirley Jones would stay with him occasionally. Mr. Williams testified that he is disabled due to paralysis in his leg.

He testified that he was at home most of the day on February 21, 1992. He said that he and Mr. Patterson began drinking beer around 10:00 a.m. and went to Hartsville to purchase a half-gallon of whiskey later that day. He stated that Mr. Patterson went to pick up Melanie Brown and was gone for a little while during the day. He also stated that Ms. Jones and her children were at the trailer most of the day. He said that the defendant came by earlier in the day, left and returned around 6:00 p.m.. He said that Kathy Slayton, the victim's girlfriend, visited for a few minutes because she and the victim had gotten into an argument. As soon as the victim arrived, he and Ms. Slayton started arguing. Mr. Williams testified that Ms. Jones, Ms. Brown and Ms. Slayton soon left to take Ms. Slayton to Hartsville.

Mr. Williams stated that he and Mr. Patterson had consumed about a case of beer and about two-thirds of the half-gallon of whiskey. He stated that the victim kept causing trouble until he finally asked the victim to leave. He stated that Mr. Patterson and the defendant helped the victim to the door. He said that Mr. Patterson came back inside and sat down while the defendant walked the victim out to the car. He stated that the door was partially open and he could see the victim swinging at the defendant. He said that the defendant and the victim swung at each other a few times and that he heard a tussle but never did see anything else. Mr. Williams said that the defendant was outside for about five minutes, returned to the trailer and left again to visit his brother. He said that the defendant returned during the middle of the night and told him that he had been at his brother's home. He testified that the defendant never said anything about the fight with the victim.

Mr. Williams testified that he woke up around 5:30 a.m., had coffee with the defendant and took him to the jail to serve his DUI sentence. He said that he asked the defendant on the way to the jail what had happened to the victim. He said that the defendant told him not to worry about it because he had "done the m----- f-----."

Mr. Williams said the defendant did not tell him where the victim was but only said that he would not be found. Mr. Williams also stated that the defendant told him that the best thing he could do was keep his mouth shut. The next day when the defendant came to pick up his truck at Mr. Williams' trailer, he again told Mr. Williams to keep his mouth shut. Mr. Williams also testified that the defendant told him to tell Mr. Patterson to keep his mouth shut also. Three or four days after the victim's disappearance, the defendant conveyed the same threat to Mr. Williams again.

Mr. Williams testified that he spoke with Lieutenant Dallas and that he initially did not tell him everything he knew about the victim's disappearance. He said that he omitted his knowledge of the victim's death from the initial statement because he was scared of the defendant. Mr. Williams testified that after the victim's body was discovered, Lieutenant Dallas confronted him regarding his earlier statement and that he gave Lieutenant Dallas an account of the events consistent with his trial testimony. Mr. Williams stated that he never hit the victim with his cane. The trial court asked Mr. Williams whether the defendant was drunk on the night of the fight and Mr. Williams responded that the defendant was on something and that he had never seen him act like that before.

On cross-examination, Mr. Williams testified that the victim arrived at his trailer soon after Ms. Slayton and that he knew there would be trouble. He said that after the women left to take Ms. Slayton to Hartsville, the victim kept running his mouth and fussing at everybody. Mr. Williams told the victim to just go home. He recounted that the victim had slammed his guitar into the floor earlier that night. When asked if he did anything in reaction to that, Mr. Williams responded that he did not because the victim would commonly pull a knife and he did not want to get cut.

Mr. Williams testified that he heard the victim threaten the defendant once they got outside. He testified that he saw the victim swing at the defendant and the defendant bust the victim's head. He saw the defendant hit the victim with his fist a couple of times before they went out of sight. He said the defendant returned to the trailer and had a little bit of blood on his hand. He stated that the defendant said he was going to visit his brother. Defense counsel inquired into the defendant's brother's feelings towards alcohol and Mr. Williams testified that the defendant's brother would not let anyone in his house who had been drinking, yet the defendant told him that he went to see his brother. Mr. Williams stated that the women arrived from Hartsville about fifteen minutes after the defendant left. He said that Ms. Slayton asked where the victim was and he told her that the victim must have gone home after he and the defendant fought.

The state recalled Patricia Wix to the stand in order to ask her questions relative to Mr. Meador's fear of the defendant in an effort to impeach Mr. Meador's credibility. She testified that she called Mr. Meador after being contacted by Lieutenant Dallas in March of 1992. She stated that Mr. Meador advised her not to say anything nor to tell that they were at Mr. Williams' trailer on the night of the victim's disappearance. She stated that he told her that the defendant had connections and for her to keep her doors locked and her gun loaded. She testified that she told Mr. Meador that his advice was stupid and that the best thing to do was to tell the truth. On cross-examination, she admitted that she and Mr. Meador had a nasty breakup in early March of 1992 and that she has since had his child but does not receive any child support from him.

Doug Patterson testified that he had known the victim two years at the time of his death in February of 1992. He stated that he did not know the defendant very well and that they had met through Billy Williams. He admitted that he was

currently confined in the Macon County Jail for driving under the influence, public intoxication and worthless checks convictions. He testified that he and Mr. Williams began drinking around noon on February 21st. He stated that he, Mr. Williams, the defendant, the victim, Ms. Jones, Ms. Brown and Ms. Slayton had all been drinking that night and that the women left to go to a liquor store in Hartsville. He stated that Mr. Meador and Ms. Wix arrived and that the victim tried to pick a fight with Mr. Meador.

Mr. Patterson testified that the victim tried to stand up and fell over on a table. He testified that he helped the victim up and straightened a lamp that he had knocked over. He stated that the defendant grabbed the victim by the arm and started out the door with him. Mr. Patterson denied that he helped carry the victim outside. He stated that the defendant shoved the victim outside and proceeded to stomp and kick the victim. He stated that the defendant did not use his fists but kicked the victim with his cowboy boots. After about two minutes, the defendant returned to the trailer. He paced the floors for a few minutes and went back outside. He returned a few minutes later. Mr. Patterson testified that Ms. Wix and Mr. Meador left after the defendant returned the second time.

Mr. Patterson testified that the defendant returned in the middle of the night. He stated that he did not see the victim again. He admitted that he did not tell Lieutenant Dallas everything in his initial statement on March 5th but explained that he was scared. He stated that Mr. Williams had warned him of the defendant's threats. He testified that he told Lieutenant Dallas everything on March 16th. He denied that he ever struck the victim on February 21st.

On cross-examination, Mr. Patterson admitted that he met the victim while serving a sentence in the Macon County Jail for DUI. He also stated that he and the defendant were in the same jail while the defendant awaited trial and that the

defendant gave him some “scary” looks. He described Mr. Williams as a friend but minimized his relationship with the defendant. He stated that the defendant was not as drunk as he and Mr. Williams on the night of the offense. He related that Mr. Williams had warned him not to talk.

Mr. Patterson stated that the victim did not have a knife that night and that the victim had never assaulted him with a knife. He stated that the victim tried to pick a fight with Mr. Meador. He stated that the victim was not assaulting anyone, but was just drunk, when he stumbled and knocked over the lamp. He stated that Mr. Williams told the victim that he would have to leave. Mr. Patterson testified that the defendant walked the victim to the door where he either pushed the victim out or the victim fell down the steps. He stated that the door stayed open and that he might have walked to the steps but was positive that he did not leave the steps.

Mr. Patterson stated that the victim was lying on the ground and the defendant began to kick him in his side. He denied seeing the defendant put the victim in his truck. He testified that the victim was hurt bad. He said that when the victim fell down the steps, he hit his head and began to bleed. He said that when the defendant returned inside, the defendant was relatively calm and told everyone that he had “kicked [the victim’s] ass good.” He stated that he never saw any blood on the defendant.

Mr. Patterson stated that he was not really familiar with the area where the victim’s body was found and denied ever going there with the defendant. He stated that he was afraid of the defendant when he talked to Lieutenant Dallas and that he is still afraid of the defendant but added that the defendant has never done anything to him personally. He stated that the defendant left the trailer for about an hour, returned and everyone fell asleep.

Shirley Jones testified that she was dating Mr. Williams in February of 1992. She said that she knew the victim through her aunt, Kathy Slayton, who dated the victim. She testified that she was at home all day on February 21st and that the defendant and his wife dropped by in the morning on their way to court for the defendant's DUI charge. She said that Mr. Patterson and Ms. Brown visited later and spent the day drinking with Mr. Williams. She stated that the victim came over and, later, Ms. Slayton arrived. She said that she and Ms. Slayton and Ms. Brown went to Hartsville to buy more liquor.

Ms. Jones could not remember when the defendant arrived that night. She said that she and the other women were gone about an hour. She said that the first person she saw when they returned was Mr. Williams who was talking on the telephone. She said that she could not remember seeing either the defendant or the victim. She stated that nothing was ever said in front of her about the defendant and victim's fight. She said that she never saw Ms. Wix or Mr. Meador at her trailer that night.

On cross-examination she testified that she was not drinking on that day. She also stated that Mr. Williams had a large stick that he kept nearby for his own protection but that she had never seen him use it. She said that the victim entered the trailer without knocking but that no one said anything to him about it. She said that Ms. Slayton and the victim were always arguing and that Ms. Slayton had no problem setting the victim down in a chair that night because he was so drunk. She never saw the victim with a knife that night. She testified that Mr. Williams did not like Ms. Slayton or the victim because they had blamed him for some damaged property at the trailer park. However, she stated that she had never seen the victim and Mr. Williams or Mr. Patterson fight about anything.

Billy Meador testified for the defendant. He stated that he received a telephone call from Ms. Wix the day that they both testified for the state and that she was very upset. He stated that she blamed him for having to come back to court. He stated that they had broken up about a week after the victim disappeared and that she did not really like him anymore. He denied telling her to lie. He stated that he had never been threatened by the defendant about his testimony and said that he was not afraid of the defendant. On cross-examination, he admitted that he had initially told Lieutenant Dallas that he was not at the trailer on the night of the victim's disappearance. On redirect examination, he testified that he had lied to Lieutenant Dallas initially because he did not want to get involved.

Kathy Slayton testified for the defendant. She stated that she and the victim were living together in February of 1992. She described their relationship as stormy. She stated that when she arrived at Mr. Williams' trailer on February 21st, the victim was glad to see her. She said that she, Ms. Jones and Ms. Brown went to Hartsville for some liquor. She said that when they returned, the defendant was at the trailer, but the victim was gone. She asked where the victim was and Mr. Williams told her that he left. She stated that the victim's mother lived across the street so she just assumed that he had gone over there.

Ms. Slayton testified that the victim would sometimes get "cantankerous" and that he had pulled a butcher knife on her earlier that day. She said that he was so drunk he could not cut her with it and that she had never seen him threaten anyone else with a knife. She did not know of any animosity between the victim and Mr. Patterson or the defendant. She stated that she did not see any blood on anyone, specifically the defendant, when she returned from Hartsville.

Larry Turnbow, an investigator for the public defender's office in Macon County, testified for the defendant. He stated that he interviewed Ms. Wix who told him that she had stopped to check on the victim when she and Mr. Meador left the trailer. She told him that she did not get close enough to touch the victim but that she could see that he was breathing.

The defendant testified that he and his wife did not stop by the Williams' trailer on the morning of February 21st. He denied that he had court on that day and stated that he had court a week earlier. He stated that he worked all day in Nashville on the 21st. He came to Lafayette to serve his forty-eight hours for a DUI. He admitted that he had a felony record from Arkansas dating back to 1982. He testified that he successfully completed his parole and the only other trouble he had gotten into was the DUI. He testified that he turned himself in when he found out that he had been indicted for the murder.

Relative to February 21st, the defendant testified that he recalled going to Mr. Williams' trailer and asking Mr. Williams if he could leave his truck there while he served his forty-eight hours that weekend. He stated that Mr. Williams agreed to give him a ride to the jail. He stated that he arrived at the trailer around 7:00 p.m. and that Ms. Jones, Mr. Williams, Mr. Patterson and Ms. Brown were all there. He said that there was a lot of drinking going on and that he also drank. He said that he drank five beers on his way to Lafayette from Madison and that he drank more beer when he arrived at the trailer. He said that Mr. Williams was playing the guitar and that the victim kept messing with it. He said that Mr. Williams told the victim to stop and that the victim would stop for a little while and then start back up again. He said that Mr. Williams finally got angry and hit the victim in the head four or five times with a large stick that he kept near his chair.

The defendant testified that Ms. Wix and Mr. Meador arrived later and that the victim said something to Ms. Wix about her appearance but otherwise did not argue with anyone. He stated that the victim never did lunge toward Mr. Williams. He testified that Mr. Patterson pushed the victim out the door after Mr. Williams beat him. He said that the victim was lying on the sidewalk and that Mr. Patterson went outside immediately. He said that he did not go outside until a few minutes later. He could hear the victim grunting and Mr. Patterson cursing and kicking him. The defendant stated that he went outside and told Mr. Patterson to stop.

The defendant testified that Mr. Williams asked him and Mr. Patterson to move the victim away from the front of his trailer and they picked him up and carried him across the street. He said that the victim was breathing and that there was no indication that he was seriously hurt. He said that they all returned to the trailer and that Mr. Williams and Mr. Patterson said that they wanted the victim moved in order that the girls would not know what had happened. He stated that Ms. Wix and Mr. Meador had already left. He said that he and Mr. Patterson put the victim in his truck and carried him away. He said that the victim was still alive and that he had no reason to be concerned that he might die. He said that Mr. Patterson directed him to Dark Hollow Road where they sat the victim on the side of the road leaning against a tree. The defendant denied that he ever hit or kicked the victim. He stated that he never got any blood on himself.

The defendant testified that the truck ran out of gas on their way back to the trailer and that he and Mr. Patterson went to a nearby house where Mr. Patterson telephoned for help. He did not know who Mr. Patterson called but the owner of the house took them to get gas. They got gas and returned to the Williams' trailer. He said that the women arrived about ten minutes later and that Mr. Williams told Ms. Jones to take Ms. Slayton home. He testified that he has been in the Macon County

Jail with Mr. Patterson since he turned himself in but that he has never said anything to him despite having the opportunity to do so.

On cross-examination, he admitted that he traveled frequently in order to find work. He denied ever calling Mr. Williams about the victim. He testified that Ms. Wix and Mr. Meador were at the trailer when Mr. Williams grabbed the stick and hit the victim on the head. He maintained that he went outside and stopped the fight between Mr. Patterson and the victim. He also stated that Ms. Wix and Mr. Meador left immediately after the fight began. He admitted that he was convicted for making a false statement on an application for a firearm and that he was also convicted of numerous thefts and burglaries and one robbery. He stated that the victim was alive when they left him on Dark Hollow Road and that he could have tumbled down the ravine. He stated that the prior convictions occurred thirteen years ago and that he was rehabilitated now. He also stated that Ms. Wix, Mr. Patterson and Mr. Williams lied in their testimony.

On redirect-examination, the defendant explained that a friend of his actually committed the robbery and that he took the conviction in order that his wife would not be charged with anything. He stated that after he had completed his forty-eight hours, he went back to Dark Hollow Road because he was concerned about the victim. He stated that he could not find the victim and reiterated that the last time he saw the victim he was alive. On recross-examination, he stated that he assumed that the victim had made it home all right when he did not find him on Dark Hollow Road.

Jennifer McDonald, the custodian of records for the Macon County General Sessions Court, testified that the defendant appeared in court for a DUI charge on January 17, 1992. However, her records did not indicate when he served his forty-eight hours.

Kevin Gregory testified that he lives in the house on Union Camp Road at the corner of Dark Hollow Road. He recalled that Mr. Patterson came by his home in February of 1992 at around 10:30 p.m. and told him that he had run out of gas on Dark Hollow Road. He stated that Mr. Patterson used the phone but could not locate anyone for help so he offered to take him for gas. He said that another individual whom Mr. Patterson referred to as "Billy" was also there but he could not make a positive identification of the defendant. He said that he took them for gas, dropped them off at the truck and never saw either one of them again.

On cross-examination, Mr. Gregory testified that he could not recall the exact date that Mr. Patterson came by for help. He said that the truck was far into the woods on Dark Hollow Road, about three quarters of a mile away from his house. He learned several weeks later that a body had been discovered in the woods but he never made any connection between the two events because there is a lot of traffic on the road. He stated that he was certain that he helped Mr. Patterson in February and that it was probably between the 15th and the 25th of February. On redirect-examination he added that the man with Mr. Patterson was not handicapped in any way.

## I

The defendant contends that the evidence is insufficient to support his conviction for second degree murder. He argues that several of the witnesses gave inconsistent testimony and that Mr. Gregory's testimony refutes the state's proof. The state responds that it was the jury's duty to resolve any inconsistencies in the testimony and that it was the jury's prerogative to disbelieve Mr. Gregory.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A conviction for second degree murder requires proof that the defendant committed an unlawful, knowing killing. T.C.A. §§ 39-13-201(a) and -210(a)(1). Numerous witnesses testified that the defendant violently kicked and beat the victim. Despite some inconsistencies relative to the sequence of events on the night of the murder, the state's witnesses' testimony was consistent about the fact that the defendant kicked and beat the victim. Only the defendant testified that Mr. Patterson beat and kicked the victim. The jury was entitled to disbelieve the defendant's testimony and to resolve any other inconsistencies in the testimony of the state's witnesses in finding beyond a reasonable doubt that the defendant knowingly killed the victim. We hold that there is sufficient evidence that the defendant committed the offense of second degree murder.

## II

The defendant contends that the trial court erred when it allowed the state to recall Patricia Wix, after she had testified and been excused, for the purpose of impeaching the testimony of Barry Meador. He argues that by allowing Ms. Wix to be recalled, the trial court allowed her to be presented as a more credible witness. He further argues that the limiting instruction relative to the use of Ms. Wix's testimony was "insufficient to undo the damage of placing this witness in a superior position to the other witnesses." The defendant argues that the state violated rules of sequestration

and that it was obvious from her testimony that Ms. Wix had talked to other witnesses before returning to the stand. The state responds that no rules of sequestration were violated and that recalling Ms. Wix did not unfairly prejudice the defendant.

Ms. Wix was recalled for the purpose of impeaching the testimony of Mr. Meador. The decision to recall an excused witness is vested within the discretion of the trial court. State v. McAlister, 751 S.W.2d 436, 438 (Tenn. Crim. App. 1987); State v. Johnson, 685 S.W.2d 301, 306 (Tenn. Crim. App. 1984). Ms. Wix testified that Mr. Meador had contacted her and told her not to tell the authorities anything about the events on the night of the murder. She stated that Mr. Meador was scared of the defendant and that he had instructed her to lie. Tenn. R. Evid. 616 permits impeachment by evidence of bias or prejudice and allows the impeachment through both cross-examination and extrinsic evidence. As noted by the Advisory Commission Comments, evidence of bias or prejudice is an important ground for impeachment. See also, State v. Reid, 882 S.W.2d 423, 427 (Tenn. Crim. App. 1994). Ms. Wix's testimony was relevant to impeach the credibility of Mr. Meador. After she testified, the trial court extensively instructed the jury that the purpose of her testimony was to impeach Mr. Meador's testimony and that the jury should use the testimony to determine the credibility of either Ms. Wix or Mr. Meador. The trial court made it clear that Ms. Wix's testimony was no more important than that of any other witness. We conclude that the trial court did not abuse its discretion in allowing Ms. Wix to testify for the purpose of impeaching the testimony of Mr. Meador.

Relative to the defendant's argument that recalling Ms. Wix violated the rule of sequestration (known as the Rule), we note that the trial court overruled the defendant's motion for a mistrial based upon this contention, finding that there was no proof that Ms. Wix had discussed Mr. Meador's testimony with any other witnesses or parties. The Rule is codified in Rule 615, Tenn. R. Evid., which requires the exclusion

of witnesses, including rebuttal witnesses, from the courtroom upon the request of either party. The purpose is to insure that a witness' testimony is not improperly influenced by other evidence already presented. However, as the Advisory Commission Comments note, the trial court may permit a witness to testify after hearing other testimony "if fair under the circumstances." In this case, there is no proof that Ms. Wix overheard any trial testimony, other than her own, or discussed testimony with any other parties or witnesses. The defendant has failed to show that any violation of the Rule occurred or that he was prejudiced by Ms. Wix being recalled.

### III

The defendant contends that the trial court erred by imposing an excessive sentence. He argues that he should not have been classified as a Range III, persistent offender but should have been sentenced as a Range II, multiple offender and that the trial court failed to weigh properly the applicable enhancing and mitigating factors in determining the length of his sentence. The state concedes that the defendant should be classified as a multiple offender but argues that the maximum sentence as a multiple offender of forty years is still appropriate.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court follows the statutory sentencing procedure, makes findings of fact that are adequately supported by the record and gives due consideration and proper application of the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered

the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

As the state concedes, the defendant qualifies as a multiple offender because he has "[a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes . . . or one [1] Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony." T.C.A. § 40-35-106(a)(1) and (2). The defendant's present offense is second degree murder, a Class A felony. His prior record consists of two burglaries of a habitation and one robbery, all Class C felonies. His record also reflects several theft and burglary of a business convictions. However, these convictions do not enter into our consideration of the defendant's offender status because they are either Class D or E felonies. The three Class C felony convictions qualify the defendant as a Range II, multiple offender and expose him to a range of punishment of twenty-five to forty years. Initially, the defendant argues that the trial court should not have imposed the enhancement factors because the state did not file a notice of enhancement factors. It is not necessary that the state file a notice of enhancement factors under T.C.A. § 40-35-114 in order for the trial court to consider them at sentencing. The notice requirement of the sentencing act applies to the determination of offender status, not sentence length.

The trial court applied the following enhancement factors as listed in

T.C.A. § 40-35-114:

(1) the defendant has a previous history of criminal convictions in addition to those necessary to establish the appropriate range,

(4) the victim was particularly vulnerable due to his intoxication and

(8) the defendant has a previous history of unwillingness to comply with conditions of a sentence involving release into the community.

It applied no mitigating factors.

The defendant argues that factor (1) should not apply because the defendant's prior record was already considered in the determination of his offender status. However, as stated previously, the defendant possessed a significant criminal history of burglaries, thefts and one federal conviction relating to the falsification of information to obtain a firearm in addition to the three Class C felonies considered in establishing his offender status. Specifically, the defendant's record reflects three third degree burglary, four theft, three public intoxication, two disorderly conduct, two driving under the influence, one escape and two contempt of court convictions in Arkansas in addition to the federal offense and offenses used to determine his offender status. Based upon this extensive history, factor (1) weighs heavily in enhancement of the sentence.

The defendant argues that factor (4) should not apply because the victim, although intoxicated, was the aggressor in the altercation. Despite the evidence in the record showing the victim's aggressive behavior toward others, the record supports the application of factor (4) in light of the overwhelming testimony that the victim was the most intoxicated of any of those present and was having difficulty standing up at the time the defendant beat and kicked him. The testimony of several of the witnesses

reflects that the victim was essentially unable to defend himself due to his extreme state of intoxication. We conclude that factor (4) was properly applied in enhancement, given the victim's severe intoxication. See State v. William Ray Rhodes, No. 02C01-9406-CC-00124, Henry Co. (Tenn. Crim. App. July 19, 1995), app. denied (Tenn. Nov. 27, 1995).

The defendant argues that factor (8) should not apply because there was no evidence that the defendant had ever violated the terms of probation or parole. On the other hand, the record reflects that the defendant was placed on twenty-eight days probation for false swearing in January of 1979 and was arrested seven days later for disorderly conduct and unlawful use of a driver's license. He was also placed on nine months probation for DUI in June of 1980 and in August of 1980 he was arrested and served fifteen days in jail for disorderly conduct, criminal trespass and escape. However, as the defendant points out, he successfully completed parole in March 1990 after serving six and one-half years in the custody of the Arkansas Department of Corrections. Therefore, although we conclude that the defendant's prior record reflects some history of unwillingness to comply with conditions of release, factor (8) should be given little weight in enhancing his sentence.

The defendant argues that the trial court should have applied the following mitigating factors as listed in T.C.A. § 40-35-113:

(3) substantial grounds exist tending to excuse the defendant's criminal conduct, though failing to establish a defense and

(11) the defendant, although guilty of the crime, committed the crime under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct.

The defendant claims that his intoxication should be considered as mitigation under factor (3). The evidence is inconsistent about the defendant's state of intoxication on the night of the offense. The defendant testified that he was not intoxicated.

Furthermore, voluntary intoxication is not generally considered as mitigation. See T.C.A. § 40-35-113(8). The defendant argues in support of factor (11) that the evidence shows that there was no animosity or quarrel between him and the victim and that there was no evidence of any reason for his conduct. However, given the evidence in this case, the defendant's argument lends itself to a higher degree of culpability in terms of his committing a senseless killing. We conclude that the trial court correctly found that no mitigating factors applied.

In consideration of our determinations, we conclude that the defendant's history of criminal convictions and behavior that exists in addition to that necessary to place him into Range II should be given considerable weight. Likewise, the defendant's actions toward the victim, given the victim's intoxicated condition, reflects malignity, as well. We conclude that the record supports the imposition of a thirty-five-year sentence upon the defendant as a Range II, multiple offender.

The defendant's conviction is affirmed, but his sentence is modified to thirty-five years as a Range II, multiple offender in the custody of the Department of Correction.

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Joseph M. Tipton, Judge

CONCUR:

(not participating)  
Jerry Scott, Presiding Judge

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David G. Hayes, Judge

